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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928 9

No. 766 50

T. L. CARPENTER AND LILLIE V. CARPENTER, PETITIONERS,

vs.

A. S. J. SHAW, AS STATE AUDITOR OF THE STATE OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR CERTIORARI FILED MARCH 13, 1929

CERTIORARI GRANTED APRIL 15, 1929

(34,075)

( )

SUPREME COURT OF THE UNITED STATES

---------- TERM

No.----------

T. L. CARPENTER AND LILLIE V. CARPENTER,
Petitioners,

vs.

A. S. J. SHAW, *State Auditor of the State of Oklahoma*,
Respondent

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

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IN SUPREME COURT OF OKLAHOMA

Case Made from District Court of Oklahoma County—Filed February 2, 1928

[File Endorsements Omitted.]

IN DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA

No. 52682

T. L. CARPENTER AND LILLIE V. CARPENTER,
Plaintiffs

vs.

A. S. J. SHAW, State Auditor of the State of Oklahoma,
Defendant

AMENDED PETITION.

Now come the plaintiffs, T. L. Carpenter and Lillie V. Carpenter, husband and wife, complaining of the defendant, A. S. J. Shaw as State Auditor of the State of Oklahoma, and represent and show to the court that said defendant, A. S. J. Shaw, is the duly elected, qualified and acting State Auditor of the State of Oklahoma, and this action is being maintained and prosecuted against him in his official capacity as State Auditor of the State of Oklahoma.

For cause of action against said defendant, plaintiffs respectfully represent and show to this honorable court:

FIRST CAUSE OF ACTION.

(1) That the plaintiffs, T. L. Carpenter and Lillie V. Carpenter, are Choctaw Indians, duly enrolled as such opposite roll numbers 1493 and 408, respectively, of the approved rolls of the Choctaw Nation or Tribe of Indians; the said T. L. Carpenter being enrolled as a Choctaw by intermarriage and the said Lillie V. Carpenter being en-

rolled as of one-sixteenth Choctaw blood. That by virtue of their citizenship in said nation or tribe of Indians, the plaintiff T. L. Carpenter received as a portion of his allotment of the allotable lands of the Chickasaw and Choctaw Nations or Tribes of Indians the following described lands and tenements situated in Carter County, State of Oklahoma, to-wit:

The Southwest Quarter of Section 22, Twp. 2 South, R. 3 West, for which patent was issued to him on February 27th, 1907; and that there was allotted to the plaintiff Lillie V. Carpenter, as a portion of her allotment of the allotable lands of the Chickasaw and Choctaw nations or tribes of Indians, the following described lands and tenements situated in Carter County, State of Oklahoma, to-wit: The North half of the Northeast of Sec. 22, Twp. 2 South, R. 1 West, for which patent was issued to her on October 10th, 1906. That by virtue of the allotment of said lands to these plaintiffs as aforesaid, they thereupon and thereby became, have ever since been and now are vested with an indefeasible, fee simple title to said lands, respectively, in accordance with the existing treaties between the said nations or tribes of Indians and the United States Government and the various acts of Congress in relation to the lands of said Indians and the allotment thereof in severalty between the various members and citizens of said nations or tribes of Indians; and that plaintiffs have never parted with their title to said lands, respectively, or any interest therein, other than as hereinafter set forth.

(2) Plaintiffs further allege and state that subsequent to the allotment of said lands to these plaintiffs, respectively, as aforesaid, these plaintiffs leased said lands to one Wirt Franklin of Ardmore, Oklahoma, the Lone Star Gas Company, a corporation of Dallas, Texas, and the Humble Oil and Refining Company of Houston, Texas, for oil and gas purposes, and reserving unto themselves as the owners of said lands, respectively, a one-eighth royalty of all oil and gas which should be produced and saved therefrom by said lessees. That subsequent thereto, said lessees have by

exploration and development operations produced and are now producing oil and gas in paying quantities from said described lands under the terms of said leases, and have been during the time hereinafter referred to and are now paying to these plaintiffs large sums of money as royalties in accordance with the terms and provisions of said leases.

(3) That in the process of operating said leases and producing oil and gas therefrom by the lessees, the one-eighth portion of said minerals belonging to plaintiffs as royalties under the term of said leases, are pumped immediately as the same are extracted from the earth, into the pipe lines and containers of the purchaser of such minerals, where the same are passed through meters to determine the amount of such royalty interest and the amount due these plaintiffs therefor; and that the production and sale of such minerals in effect constitute one transaction; and in truth and in fact, the said Humble Oil and Refining Company purchases and takes the entire royalty interest in said minerals accruing to plaintiffs under the terms of its said lease at the mouth of the wells from which the same are produced, and plaintiffs do not in fact receive any portion of said minerals, but the value thereof in money instead.

(4) Plaintiffs further respectfully represent and show to the court that the defendant herein is demanding of these plaintiffs at quarterly periods ending March 31st, June 30th, September 30th and December 31st, respectively, the payment of a tax upon said royalty oil and gas and the royalty interest in said lands, commonly known as a gross production tax, equal to three percentum of the gross amount received by these plaintiffs during each such quarter from the sale of the one-eighth royalty oil and gas reserved and accruing to these plaintiffs from said lands under the terms and provisions of said leases. That during the year ending December 31st, 1926, these plaintiffs received the sum of $16,333.00 from the sale of royalty oil and gas produced during the said period from said lands and during the quarter ending March 31st, 1927, these plaintiffs received the sum of $4,000.00 from the amount of royalty

oil and gas produced from said lands during said period by the above named lessees under the terms and provisions of said leases; and that thereafter, and on or about the 30th day of April, 1927, these plaintiffs, in compliance with the demand of the defendant for the payment thereof, paid to the said defendant the sum of $490.00, being the equivalent of three per centum of the gross amount received by these plaintiffs from the sale of said oil and gas during the year ending December 31st, 1926, and also paid to the defendant the sum of $120.00, being the equivalent of three per centum of the gross amount received by these plaintiffs from the sale of said royalty oil and gas during the quarter ending March 31st, 1927, which sums were demanded by the defendant, and were paid by these plaintiffs as a tax, commonly known as a gross production tax, upon the proceeds of the sale of said royalty oil and gas and upon the royalty interest of such minerals in the lands above described, from which the same were produced.

(5) Plaintiffs further show to the court that the payment of said tax by these plaintiffs as aforesaid, was made under duress and protest, and that at the time of the payment thereof these plaintiffs served written notices of protest upon the defendants herein, setting forth the grounds of objection to said taxes and the reasons of the invalidity and illegality of the said taxes so demanded by the defendant, all in the manner and form as required by law, as shown by true copies of said notices of protest which are attached hereto marked Exhibit "A" and "B", respectively, and made part of this petition. That payment of said taxes was necessary to prevent the issuance of the defendant's warrant for the collection of the same, and to prevent the stopping by the defendant of further payments accruing to these plaintiffs for the sale of said royalty oil and gas, and to prevent the accumulation of penalties thereon.

(6) Now these plaintiffs further allege and state that by virtue of the various treaty provisions existing between the Choctaw and Chickasaw nations or tribes of Indians and the United States Government, and the acts of Con-

gress in relation to the lands of said nations or tribes of Indians, and the allotment thereof in severalty between the various members or citizens of said nations or tribes of Indians, and particularly the provisions of Act of Congress of June 28th, 1898, (30 Statute at Large 505, Chap 517), and the provisions of the Constitution and laws of the State of Oklahoma, said lands and the issues, rents, revenues, royalties and proceeds arising therefrom, including said royalty oil and gas, are exempt to these plaintiffs and are not subject to taxation in any manner or form for any purpose, in the hands of the plaintiffs, the allottees of said lands, respectively, for a period of twenty-one years from date of the issuance of patents to said lands to these plaintiffs, respectively, which period has not yet expired; by reason of which, plaintiffs say that said taxes were exacted of them without authority of law and that said gross production taxes so paid by these plaintiffs to the defendant herein, as aforesaid, are and were excessive, illegal and void, to the full extent thereof, and these plaintiffs are therefore entitled to recover the same from the defendant herein.

(7) Plaintiffs further say that should it be contended and should the court be of the opinion and find that such tax as to the plaintiffs, is not a tax levied or assessed either directly or indirectly upon said lands, nor upon the rents, royalties, revenues, proceeds and income arising therefrom; and that it should be further contended that such royalty oil and gas, when severed from the soil, immediately becomes personal property, wholly separate, disconnected and distinct from said lands from which the same are and were produced, and that such royalty minerals immediately became taxable, and that such gross production tax is and was levied as to these plaintiffs and other Indian allottees similarly situated, against said royalty minerals as personal property after severance and wholly separate and distinct from said lands and all interest therein from which such minerals are and were produced, and the court should conclude that such tax is not and was not prohibited by any of the aforesaid treaties, statutory or constitutional pro-

visions; and in no way violates the tax exemptions granted to these plaintiffs and other allottees as to their said allotments, that nevertheless, under such circumstances and conditions, such a tax is and was wholly illegal and void and unenforcible as to these plaintiffs and other Indian allottees, similarly situated, for the following reasons, to-wit:

(a) That it is provided in Section 50 of Article 5 of the Constitution of Oklahoma, that the legislature of the State shall pass no law exempting any property within this state from taxation, except as otherwise expressly provided in said constitution. That it is further provided by Section 9959 C. O. L. 1921, that all property in this state is subject to taxation except such only as is expressly exempt by law; and that by virtue of said constitutional and statutory provisions of this state, all property within this state of every kind and character, both personal and real, is subject to taxation and is required to be taxed in some manner and form, except such only as is expressly exempt by some provision of the constitution of this state, or by some controlling Federal law. That no exemption exists as to minerals, such as oil and gas, which are stored in and are a part of the lands of individuals, and such mineral rights inherent to said lands within this state, other than those provisions relating to lands of Indian allottees, whose lands are exempt to them under the provisions of some Federal Law or Treaty; and that therefore, all such minerals and mineral rights attached to and inherent in such lands, including both the rights of lessees and royalty owners, other than those of Indian allottees whose lands are exempt to them from taxation under some Federal Law or Treaty, are required under the laws of this state to be taxed in some manner.

(b) That as expressly provided by the terms of Section 7464, C. O. L. 1921, under which the State Auditor purports to act in the cases herein referred to, and as construed by the Supreme Court of this State, said gross production tax is not a tax upon the minerals only after the same are severed from the soil, but is a property tax, the equivalent of an ad valorem tax, and in full and in lieu of all taxes by the

state, counties, cities, towns, townships and school districts, upon such minerals during the year in which the same are produced, and in addition thereto, upon the rights attached to or inherent in the rights to said minerals, upon the leases for petroleum or other crude oil or mineral oil or natural gas, and upon the mining rights and privileges for the minerals aforesaid belonging to or appertaining to the land and upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas, and actually used in the operation of such well, and upon any investment in leases, rights, privileges, or other property referred to in said statute. That as to the producer of such minerals, said tax covers and includes not only the minerals produced during the taxable year, but also the lease or leases for oil and gas purposes upon said lands, and the amount invested therein (which is always of great value and of necessity must be taxed under the constitution of this state, unless expressly exempt by some Federal Law or Treaty), and upon the rights and privileges incident to said leases and the machinery, appliances and equipment in and around any well producing oil or gas and used in the operation thereof.

(c) That as to the land or royalty owner, said statute provides, and is so construed by the taxing officials of the State of Oklahoma, that such tax covers and includes not only such minerals as are produced during the taxable year, but also covers and includes and is levied and assessed upon the value of the royalty interest in the remaining minerals which are stored in the ground and the mineral rights attached to and inherent in said lands. That no higher value is placed by the taxing officials of this state for the purpose of an ad valorem tax upon lands highly productive of oil and gas than upon similar lands containing no such minerals, for the reason said gross production statute provides and is so construed by the taxing officials of this state, that said gross production tax is levied upon and includes the value of the mineral rights in said lands. Plaintiffs further say that in a majority of cases within this state, of lands producing oil and gas, that the royalty interest or mineral

rights incident to said lands including the minerals stored therein and the right to extract and remove such minerals therefrom, have been severed by a sale thereof by the fee owner, and in such cases, what is commonly called and designated the surface rights, which is taxable on an ad valorem basis, is owned by one person, and the title to such mineral rights and royalties, which property rights are of great value, and upon which no tax is paid other than said gross production tax, is vested in others, the plaintiffs say that to levy a tax upon plaintiffs' share of such minerals as are produced during the taxable year, while other persons owning like royalty interests in lands subject to taxation, are taxed at a lesser rate on the same class of property, for the reason that such tax is based upon and includes other property admittedly taxable, to-wit, the royalty interest in said lands, violates the provisions of Section 8, Article 10, of the Constitution of the State of Oklahoma, and constitutes the taking of the property of these plaintiffs and their assignors, without due process of law, and denies to them the equal protection of the law in violation of the provisions of the Constitution of Oklahoma, and of the 5th and 14th Amendments to the Constitution of the United States.

WHEREFORE, premises considered, plaintiffs pray that the defendant be summoned to appear and answer the petition of this plaintiff, and that upon final trial being had, that these plaintiffs have judgment against the defendant for the return of said illegal taxes in the total sum of $610.00, and for the costs of this action and for all other and further proper relief to which they may be justly entitled, and will ever pray.

SECOND CAUSE OF ACTION.

For their second cause of action, plaintiffs represent and state in addition to the matters and things set forth above:

(1) That Mattie L. V. Zachary, *nee* Morris, is a Choctaw Indian, duly enrolled as such opposite roll No. 590 of the approved rolls of the Choctaw and Chickasaw nation or

tribe of Indians, being enrolled as of 1/64th Choctaw blood. That by virtue of her citizenship in the said nation or tribe of Indians, the said Mattie L. V. Zachary, *nee* Morris, received as a portion of her allotment of the Choctaw and Chickasaw Nation or tribe of Indians, the following described lands and tenements situated in Carter County, Oklahoma, to-wit:

> The North half of the Northeast quarter of the Southeast quarter and the Southeast quarter of the Northeast quarter of the Southeast quarter of Section 29, and the Northwest quarter of the Southwest quarter of Section 28, and the Northeast quarter of the Northeast quarter of the Southeast quarter of Section 21, all in Township 2 South, Range 3 West,

for which patent was issued to her on December 5th, 1908; and by virtue of the allotment of said lands to the said Mattie L. V. Zachary, *nee* Morris, as aforesaid, she thereupon and thereby became, has ever since been and now is vested with an indefeasible fee simple title to said lands, in accordance with existing treaties between said nations or tribes of Indians and the United States Government, and the various acts of Congress in relation to said lands and the allotment in severalty thereof between the various members or citizens of said nation or tribe of Indians; and the said allottee, Mattie *V. L.* Zachary, *nee* Morris, never having parted with title to said lands or other interest therein other than as hereinafter set forth.

(2) Plaintiffs further allege and state that subsequent to the allotment of said lands to Mattie L. V. Zachary, *nee* Morris, she executed and delivered to the Gypsy Oil Company and the Sinclair Oil and Gas Company a lease covering said lands for oil and gas purposes, reserving unto the said Mattie L. V. Zachary, *nee* Morris, as the owner of said lands, a one-eighth royalty of all oil and gas which should be produced and saved therefrom by the lessees; and that under and in pursuance of said lease, said lessees have produced and are now producing oil and gas from said premises and are paying large sums of money to the said allottee as

royalty in accordance with the terms and provisions of said lease. That in the process of operating said leases and producing oil and gas therefrom by the lessees, the one-eighth portion of said minerals belonging to said allottee as royalties under the terms of said leases, are pumped immediately as the same are extracted from the earth, into the pipe lines and containers of the purchaser of such minerals, where the same are passed through meters to determine the amount of such royalty interest and the amount due said allottee therefor; and that the production and sale of such minerals in effect constitute one transaction.

(3) That the defendant herein is demanding of the said Mattie L. V. Zachary, *nee Morris,* in quarterly periods ending March 31st, June 30th, September 30th and December 31st, of each year respectively, the payment of which is commonly known as a gross production tax, equal to three percentum of the entire amount received by said allottee during each such quarter from the sale of the one-eighth royalty oil and gas reserved and accruing to said allottee from said lands under the terms and provisions of said lease, and that during the quarter ending December 31st, 1926, said allottee received the sum of $3,072.73 from the sale of said royalty oil and gas produced during said period on said lands by said lessees and said allottee received the sum of $3,702.06 during the quarter ending March 31st, 1927, from the sale of said royalty oil and gas produced during said period from said lands; and that thereafter and on or about the 30th day of April, 1927, the said Mattie L. V. Zachary, *nee* Morris, in compliance with the demand of the defendant for the payment thereof, paid to the defendant herein the sum of $92.18, being the equivalent of three per centum of the gross amount received by said allottee from the sale of said royalty oil and gas during the quarter ending December 31st, 1926, and on said date also paid to the defendant the sum of $111.06, being the equivalent of three percentum of the gross amount received by said allottee from the sale of said royalty oil and gas during the quarter ending March 31st, 1927, and that such payments were demanded and made as a tax, commonly known as a gross production tax upon

the proceeds of the sale of said royalty oil and gas and the royalty interest of said allottee in said minerals in and under the lands of said allottee above described from which the same were produced.

(4) That the payment of said tax by the said Mattie L. V. Zachary, *nee* Morris, as aforesaid, was made under duress and protest, and that at the time of the payment thereof the said Mattie L. V. Zachary, *nee* Morris, served a written notice of protest upon the defendant herein setting forth the grounds of objection to said tax and the reason of the invalidity and illegality of same, and in the manner and form as required by law. That a true copy of said notice of protest is hereto attached marked Exhibit "C" and made a part hereof. That the payment of said taxes was necessary to prevent the issuance of defendant's warrant for the collection of the same, and to prevent the stopping by the defendant of further payments accruing to said allottee from the sale of said royalty oil and gas.

(5) Plaintiffs further say that by reason of the facts stated in paragraphs 6 and 7 of their first cause of action herein, which facts apply with equal force as to said allottee, said lands and the issues, rents, revenues and proceeds arising therefrom, including said royalty oil and gas and the proceeds from the sale thereof, are exempt to said allottees and not subject to taxation in any manner or form, for any purpose, for a period of twenty-one years from the date of the issuance of patent to said allottee, which period has not expired, and plaintiffs herein re-plead and make the allegations of paragraphs 6 and 7 of their first cause of action, with such necessary changes and corrections as may be necessary to apply said matters and things to said allottee, a part and parcel of this, their second cause of action, as fully and completely as if set out at length in words and figures therein.

(6) Plaintiffs further say that subsequent to the payment of said tax, under protest by the said Mattie L. V. Zachary, *nee* Morris, to the defendant herein as aforesaid, said allottee, for a good and valuable consideration, duly

assigned, transferred and set over unto these plaintiffs all her rights, title and interest in and to said illegal taxes and her claim against the defendant herein for the return thereof, and that the plaintiffs are now the owners and holders of said claim against the defendant herein, and said illegal taxes, and they are now entitled to judgment against the defendant for the return of said excessive and illegal taxes, so paid by the said allottee as aforesaid.

WHEREFORE, plaintiffs pray for judgment against the defendant in the sum of $205.24, for costs of this action and to all other proper relief to which they may be entitled and will ever pray.

THIRD CAUSE OF ACTION.

For their third cause of action, plaintiffs allege and state that in addition to the matters and things hereinabove set forth:

(1) That Julia A. Morris, enrolled as Julia A. Powell, is a Choctaw Indian, duly enrolled as such opposite roll No. 409 of the approved rolls of the Choctaw nation or tribe of Indians, she being enrolled as of 1/32nd Choctaw blood. That by virtue of her citizenship, she received as a portion of her allotment of the allotable lands of the Choctaw and Chickasaw nations or tribes of Indians the following described lands and tenements situated in Carter County, State of Oklahoma, to-wit:

> The Northwest quarter of the Northeast quarter of the Southeast quarter of Section 21, Township 2 South, Range 3 West,

for which patent was issued to her on October 10th, 1906. That by virtue of said allotment of said lands to the said Julia A. Morris, she thereupon became, has ever since been and now is vested with an indefeasible title to said lands in accordance with the existing treaties between said nation or tribe of Indians and the United States Government and the various acts of Congress in relation to said lands and the allotment thereof in severalty between the various mem-

bers or citizens of said nation or tribe of Indians. That said allottee has never parted with title to said lands or any interest therein other than as hereinafter set forth.

(2) That thereafter said allottee, Julia A. Morris, executed and delivered to the Magnolia Petroleum Company, a corporation, of Dallas, Texas, an oil and gas lease covering said lands, by the terms of which said allottee reserved to herself, as the owner of said lands, a royalty of one-eighth of all oil and gas produced and saved from said premises by said lessee; and that in pursuance of exploration and development operations under the provisions of said lease, said lessee has produced and is now producing oil and gas in paying quantities and is paying royalty thereon to said allottee, as provided by the terms of said lease. That in the process of operating said lease and producing oil and gas therefrom by the lessee, the one-eighth portion of said minerals belonging to said allottee as royalties under the terms of said leases, are pumped immediately as the same are extracted from the earth, into the pipe lines or containers of the purchaser of such minerals, where the same are passed through meters to determine the amount of such royalty interest and the amount due this allottee therefor; and that the production and sale of such minerals in effect constitutes one transaction.

(3) That said defendant is demanding of the said Julia A. Morris at quarterly periods ending March 31st, June 30th, September 30th and December 31st, of each year respectively, the payment of a tax on said oil and gas royalty, commonly known as a gross production tax, equal to three per centum of the gross amount received by said allottee for each such quarter from the sale of such royalty, and that during the year of 1926 and the quarter ending March 31st, 1927, said allottee received the sum of $1,763.00 from the sale of said royalty produced during said period from said lands, and that thereafter and on or about the 30th day of April, 1927, said allottee, in compliance with the demand of the defendant herein for the payment thereof, paid to said defendant the sum of $52.89, being the equivalent of three per centum of the gross amount received by said allottee

from the sale of said royalty oil and gas during said period, and that said payment was demanded and made as a tax, commonly known as a gross production tax, upon the proceeds of the sale of said royalty oil and gas and upon the royalty interest of said allottee in said minerals in and under said lands above described, belonging to said allottee from which said royalties were produced. That the payment of said tax by the said Julia A. Morris was made under duress and protest and that at the time of the payment thereof, the said Julia A. Morris served a written notice of protest upon the defendant herein, setting forth the grounds of objection to said tax and the reasons of the invalidity and illegality thereof, all in the manner and form as required by law. A true copy of said notice of protest is attached hereto, marked Exhibit "D" and made a part of the petition. That said tax was paid to prevent the issuance of the defendant's warrant for the collection of the same, and to prevent the stopping by the defendant of further payments accruing to the allottee from the sale of said royalty oil and gas.

(4) Plaintiffs further say that by reason of the facts stated in paragraphs 6 and 7 of their First Cause of Action herein, which facts apply with equal force as to said allottee, said lands and the issues, rents, revenues and proceeds arising therefrom, including said royalty oil and gas and the proceeds from the sale thereof, are exempt to said allottees and not subject to taxation in any manner or form, for any purpose, for a period of twenty-one years from the date of the issuance of patent to said allottee, which period has not expired, and plaintiffs herein re-plead and make the allegations of paragraphs 6 and 7 of their First Cause of Action, with such necessary changes and corrections as may be necessary to apply said matters and things to said allottee, a part and parcel of this, their Third Cause of Action, as fully and completely as if set out at length in words and figures herein.

(5) Plaintiffs further state that subsequent to the payment of said illegal taxes, the said Julia A. Morris, for a good and valuable consideration, duly assigned, transferred

and set over unto this plaintiff all her right, title and interest therein, together with her claim against the defendant herein for the return thereof, and that the plaintiffs are now the owners and holders of said claim and are the owners of said illegal taxes, and are entitled to judgment against the defendant for the return of the same.

WHEREFORE, premises considered, plaintiffs pray for judgment against the defendant on this, their third cause of action, in the sum of $52.89, together with costs of this action and for such other and further relief to which they may be justly entitled and will ever pray.

Stephen A. George,
Attorney for Plaintiffs.

EXHIBIT "A"

NOTICE OF PROTEST.

To Hon. A. S. J. Shaw, State Auditor,
State Capitol Building,
Oklahoma City, Oklahoma.

Dear Sir:

We, the undersigned, hand you herewith remittance in the sum of $490.00, which is in payment of gross production tax in said sum demanded by you for the year ending December 31st, 1926, on account of oil and gas royalties accruing to the undersigned during said year, of the total cash value of $16,333.00, from certain lands belonging to the undersigned in Section 22, Township 2 South, Range 3 West, Carter County, Oklahoma, which were allotted to them by virtue of their citizenship in the Choctaw Nation or Tribe of Indians, the title to which said land has never passed out of the undersigned, and which said lands, together with the income derived therefrom is non-taxable in the hands of the undersigned during a period of twenty-one years from the date of the issuance of patents therefor, which period has not yet expired, under the provisions of an Act of Congress of June 28th, 1898, (30 Statute at Large 505, Chap. 517) and treaty provisions of Chickasaw or Choctaw Nations or Tribes of Indians, the United States government in relation to the allotment in severalty of the

lands belonging to said nations or tribes of Indians; as construed by the Supreme Court of the United States in the case of Choate vs. Trapp, 56 L. Ed. 941, and other cases.

You are further notified that said illegal taxes are paid under duress and protest, and to prevent the issuance of your warrant therefor and any action on your part to stop and prevent any payment of future royalties accruing to the undersigned from said lands, and that suit will be instituted against you for the recovery of said illegal taxes in the sum of $490.00 within the time and in the manner provided by law.

T. L. Carpenter and Lillie V. Carpenter
T. L. Carpenter
Lillie V. Carpenter

By Stephen A. George
Their Attorney.

State of Oklahoma
County of Carter—ss.

S. A. George, of lawful age, being duly sworn, deposes and says that he is the attorney for the above named protestants, T. L. Carpenter and Lillie V. Carpenter, and that he has read the foregoing protest, knows the contents thereof and that the matters and things therein set forth are true as he verily believes.

S. A. George.

Subscribed and sworn to before me this 27th day of April, 1927.

M. W. Eddleman
Notary Public.

(SEAL)

My Commission Expires Jan. 4, 1928.

Service and receipt of the foregoing notice of protest is acknowledged the 30 day of April, 1927.

A. S. J. Shaw
State Auditor

By W. C. McDonald
Deputy.

EXHIBIT "B"

NOTICE OF PROTEST.

To Hon. A. S. J. Shaw, State Auditor,
State Capitol Building,
Oklahoma City, Oklahoma.

Dear Sir:

We, the undersigned, hand you herewith remittance in the sum of $120.00, which is in payment of gross production tax in said sum demanded by you for the quarter ending March 31st, 1927, on account of oil and gas royalties accruing to the undersigned during said quarter, of the total cash value of $4,000.00, from certain lands belonging to the undersigned in Section 22, Township 2 South, Range 3 West, Carter County, Oklahoma, which were allotted to them by virtue of their citizenship in the Choctaw Nation or Tribe of Indians, the title to which said lands has never passed out of the undersigned, and which said lands, together with the income derived therefrom is non-taxable, in the hands of the undersigned during a period of twenty-one years from the date of the issuance of patents therefor, which period has not yet expired, under the provisions of an act of Congress of June 28, 1898, (30 Statute at Large 505, Chap. 517) and treaty provisions of Chickasaw or Choctaw Nations or Tribes of Indians, the United States Government in relation to the allotment in severalty of the lands belonging to said Nations or tribes of Indians; as construed by the Supreme Court of the United States in the case of Choate vs. Trapp, 56 L. Ed. 941, and other cases. You are further notified that said illegal taxes are paid under duress and protest, and to prevent the issuance of your warrant therefor and any action on your part to stop and prevent any payment of future royalties accruing to the undersigned from said lands, and that suit will be instituted against

you for the recovery of said illegal taxes in the sum of $120.00 within the time and in the manner provided by law.

T. L. Carpenter and Lillie V. Carpenter
T. L. Carpenter
Lillie V. Carpenter
By Stephen A. George
Their attorney.

State of Oklahoma
County of Carter—ss.

S. A. George, of lawful age, being duly sworn, deposes and says that he is the attorney for the above named protestants, T. L. Carpenter and Lillie V. Carpenter, that he has read the foregoing protest, knows the contents thereof and that the matters and things therein set forth are true as he verily believes.

Stephen A. George

Subscribed and sworn to before me this 27th day of April, 1927.

M. W. Eddleman
Notary Public.

(SEAL)

My Commission Expires Jan. 4, 1928.

Service and receipt of the foregoing notice of protest is acknowledged the 30 day of April, 1927.

A. S. J. Shaw
State Auditor
By W. C. McDonald
Deputy.

EXHIBIT "C"

NOTICE OF PROTEST.

To State Auditor
State Capitol Building
Oklahoma City, Oklahoma.

Dear Sir:

I hand you herewith certified check in the sum of $92.18 to cover gross production tax in the amount of said sum,

demanded by you for the quarter ending December 31st, 1926, on account of oil and gas royalties accruing to me for said quarter from the following lands, in section 22, 28 and 29, Township 2 South, Range 3 West, Carter County, Oklahoma, known as the Mattie Morris Leases, operated by the Gypsy Oil Company at Tulsa, and the Magnolia Petroleum Company of Dallas, Texas. Said lands from which said royalties accrue to the undersigned constitute a part of the lands which were allotted to the undersigned by virtue of her citizenship in the Choctaw Nation or Tribe of Indians, title to which said lands has never passed out of the undersigned, and which said lands together with the income derived therefrom is non-taxable in the hands of the undersigned during said period by reason of the provisions of Act of Congress, June 28, 1898 (30 Stat. at Large 505, Chap. 517, as construed in the case of Choate v. Trapp, 56 Law Ed. 941, and other cases); and by virtue of Treaty Provision of the Chickasaw and Choctaw Nations or Tribes of Indians with the United States Government in relation to the allotment in severalty of the lands belonging to said Nations or Tribes of Indians.

You are further notified that said illegal taxes are paid under duress and protest and to prevent the issuance of your warrant therefor and any action on your part to stop and prevent the payment of future royalties accruing to the undersigned from said lands and to prevent the accumulation of penalties on said illegal taxes, and you are hereby notified not to pay out or part with any of said illegal taxes so paid under protest and that suit will be instituted against you for the recovery of said illegal taxes in the total sum of $92.18, within the time and manner provided by law in such cases made and provided.

Mattie L. V. Zachary, *nee* Morris
By Stephen A. George
Her Attorney.

State of Oklahoma,
County of Carter—ss.

S. A. George, of lawful age, being duly sworn, deposes and says that he is the attorney for the above named pro-

testants, Mattie L. V. Zachary, *nee* Morris, that he has read the foregoing protest, knows the contents thereof and that the matters and things therein set forth are true as he verily believes.

Stephen A. George

Subscribed and sworn to before me this 27th day of April, 1927.

M. W. Eddleman
Notary Public.

(———)
My Commission Expires Jan. 4, 1928.

Service and receipt of the foregoing notice of protest is acknowledged the 30 day of April, 1927.

A. S. J. Shaw,
State Auditor
By W. C. McDonald
Deputy.

EXHIBIT "D"

NOTICE OF PROTEST.

To Hon. A. S. J. Shaw, State Auditor,
State Capitol Building,
Oklahoma City, Oklahoma.

Dear Sir:

I hand you herewith certified check in the sum of $111.06, which is in payment of gross production tax demanded by you for the quarter ending March 31st, 1927, on account of oil and gas royalties accruing to me for said quarter of the total cash value of $3,702.06, from the following described lands belonging to me, situated in Carter County, State of Oklahoma, to-wit: The North half of the NE quarter of the SE quarter and the SE quarter of the NE quarter of the SE quarter of Section 29,, and the NW quarter of the SW quarter of Section 28, and the NE quarter of the NE quarter of the SE¼ of Section 21, all in Township 2 South, Range 3 West; and you are hereby notified that said lands from which said royalties accrued to the unde-

signed, constitute a part of the lands which were allotted to the undersigned by virtue of her citizenship in the Choctaw Nation or Tribe of Indians, title to which said lands has never passed out of the undersigned, and which said lands, together with the income derived therefrom is non-taxable in the hands of the undersigned, during a period of twenty-one years from the date of the issuance of patent therefor, which has not yet expired, under the provisions of an act of Congress June 28th, 1898 (30 Statute at Large 505, Chapter 517), and treaty provisions of the Chickasaw and Choctaw Tribes or Nations with United States Government in relation to the allotment in severalty, for the lands belonging to said nations or tribes of Indians, as construed by the Supreme Court of the United States in the case of Choate vs. Trapp, 56 L. Ed. 941, and other cases.

You are further notified that said illegal taxes are paid under duress and protest and to prevent the issuance of your warrant therefor, and any action on your part to stop and prevent the payment of future royalties accruing to the undersigned from said lands, and to prevent the accumulation of penalties on said illegal taxes; and you are hereby notified not to pay out or part with any of said illegal taxes so paid under protest, and that suit will be instituted against you for the recovery of said illegal taxes in the sum of $111.06 within the time and in the manner provided by law in such cases made and provided.

Mattie L. V. Zachary, *nee* Morris
By Stephen A. George
Her Attorney.

State of Oklahoma
County of Carter—ss.

S. A. George, of lawful age, being duly sworn, deposes and says that he is the attorney for the above named protestant, Mattie L. V. Zachary, *nee* Morris, that he has read the foregoing protest, knows the contents thereof and that the matters and things herein set forth are true as he verily believes.

S. A. George

Subscribed and sworn to before me this 27th day of April, 1927.

M. W. Eddleman,
Notary Public.

(SEAL)

My Commission Expires Jan. 4, 1928.

Service and receipt of the foregoing notice of protest is acknowledged the 30 day of April, 1927.

A. S. J. Shaw
State Auditor,
By W. C. McDonald
Deputy.

EXHIBIT "E"

NOTICE OF PROTEST.

To Hon. A. S. J. Shaw, State Auditor,
State Capitol Building
Oklahoma City, Oklahoma.

Dear Sir:

I, the undersigned, hand you herewith remittance in the sum of $52.89, which is in payment of gross production tax in said sum demanded by you for the period of five quarters beginning January 1st, 1927, ending March 31st, 1927, on account of oil and gas royalties accruing to the undersigned during said period, of the total cash value of $1,763.00, from certain lands belonging to the undersigned in Section 21, township 2 South, Range 3 West, Carter County, Oklahoma, which were allotted to her by virtue of her citizenship in the Choctaw Nation or Tribe of Indians, the title to which said land has never passed out of the undersigned, and which said lands, together with the income derived therefrom, is non-taxable in the hands of the undersigned during a period of twenty-one years from the date of the issuance of patents therefor, which period has not yet expired, under the provisions of an Act of Congress of June 28th, 1898, (30 Statute at Large 505, Chap. 517) and treaty provisions of Chickasaw or Choctaw Nations or Tribes of Indians, the United States government in relation to the allotment in severalty of the lands belonging to said nations or tribes of Indians; as construed by the Supreme Court of the United States in the case of Choate vs. Trapp, 56 L.

Ed. 941, and other cases. You are further notified that said illegal taxes are paid under duress and protest, and to prevent the issuance of your warrant therefor and any action on your part to stop and prevent any payment of future royalties accruing to the undersigned from said lands, and that suit will be instituted against you for the recovery of said illegal taxes in the sum of $52.89 within the time and in the manner provided by law.

Julia Morris

By Stephen A. George
Her Attorney.

State of Oklahoma
County of Carter—ss.

S. A. George, of lawful age, being duly sworn, deposes and says that he is the attorney for the above named protestants, T. L. Carpenter and Lillie V. Carpenter, that he has read the foregoing protest, knows the contents thereof and that the matters and things therein set forth are true as he verily believes.

S. A. George

Subscribed and sworn to before me this 27th day of April, 1927.

M. W. Eddleman
(———) Notary Public.

My Commission Expires Jan. 4, 1928.

Service and receipt of the foregoing notice of protest is acknowledged the 30 day of April, 1927.

A. S. J. Shaw,
State Auditor.

By W. C. McDonald
Deputy.

Endorsements:

No. 52,682. In the District Court of Oklahoma County, State of Oklahoma. T. L. Carpenter and Lillie V. Carpenter, Plaintiffs, vs. A. S. J. Shaw, State Auditor of the State of Oklahoma, Defendants. Amended Petition. Filed in District Court Oklahoma County, Oklahoma, Jun 27, 1927. Cliff Myers, Court Clerk, by Nettie Blumenthal, Deputy.

AND THEREAFTER, in said court, in said cause, came the defendant, on July 5, 1927, and duly filed, in writing, his certain demurrer to the amended petition of the plaintiffs, a true copy thereof, with all endorsements thereon, being as follows:

In the District Court of Oklahoma County, State of Oklahoma.

T. L. Carpenter and
Lillie V. Carpenter,
Plaintiffs,

vs.

A. S. J. Shaw, State Auditor
of the State of Oklahoma,
Defendant.

No. 52682.

DEMURRER TO AMENDED PETITION.

Comes now the defendant and demurs, generally and specially, to the amended petition of plaintiffs herein and to each and every cause of action therein stated, and for grounds of objection, states:

FIRST: That the facts stated in said amend-ed petition and in each cause of action thereof are insufficient to entitle plaintiffs to the relief prayed for, for the reason that all of taxes alleged to have been paid by plaintiffs and the assignors of plaintiffs in each cause of action for the year ending December 31, 1926, were not paid at the time and in the manner provided by law.

SECOND: That the facts stated in plaintiffs' amended petition, and in each count thereof, are insufficient to constitute a cause of action in favor of plaintiffs and against the defendant for the reason that facts are not stated in any of said counts which show that plaintiffs and the assignors of plaintiffs are exempt from the payment of the gross production tax on the royalty interest.

THIRD: That the facts stated in plaintiffs' amended petition, and each count thereof, are insufficient to entitle plaintiffs to the relief prayed for or to any relief for the reason that the same are insufficient to show that any property is unlawfully exempt from taxation or that plaintiffs have been denied due process of law or the equal protection of the law.

FOURTH: That the facts stated in plaintiffs' amended petition and in each cause of action thereof are insufficient in law to constitute a cause of action in favor of the plaintiffs and against the defendant, or to entitle plaintiffs to the relief prayed for, or to any relief.

Edwin Dabney, Attorney General,
By V. P. Crowe, Assistant Attorney General.

Plaintiffs hereby consent to filing the above demurrer out of time.

Stephen A. George,
Att'y for Plaintiffs.

Endorsements:

—No. 52682—(Omitting the title)—Demurrer to Amended Petition.—Filed in District Court Oklahoma County, Oklahoma, July 5, 1927.

Cliff Myers, Court Clerk, by Carl Traub, Deputy.

AND THEREAFTER, in said court, on July 11, 1927, a judicial day of the May 1927 term thereof, and on October 20, 1927, a juridical day of the September, 1927 term thereof, proceedings were had and things done in said cause, as is shown by the journal entry, in writing, signed by the trial judge of said cause in said court, a true copy thereof, with all endorsements thereon, as the same appears on file in said cause and of record in Journal 105 of said court, at page 46, being as follows:

In the District Court of Oklahoma County, State of Oklahoma.

T. L. Carpenter and
Lillie V. Carpenter,
Plaintiffs,

vs.

A. S. J. Shaw, State Auditor
of the State of Oklahoma,
Defendant.

No. 52682.

ORDER.

This cause come on to be heard in its regular order on the 11th day of July, 1927, upon the demurrer of the defendant to the amended petition of the plaintiffs' filed herein; the plaintiffs appearing by and through their attorney of record, Stephen A. George, and the defendant appearing by and through his attorney of record, V. P. Crowe, Assistant Attorney General of the State of Oklahoma; whereupon the parties announced ready for hearing on said matter. And the court having heard said demurrer and the arguments of counsel, took said cause under advisement until this the 20th day of October, 1927; and the court being now fully advised in the premises, is of the opinion that said demurrer should be sustained.

IT IS THEREFORE CONSIDERED, ADJUDGED AND DECREED BY THE COURT that the demurrer of the defendant to the plaintiffs' amended petition be, and the same is hereby in all

things sustained, to which action of the court the plaintiffs at the time duly except; and the plaintiffs having declined to plead further, and having elected to stand upon their amended petition filed in this cause, it is further ordered that the plaintiffs' cause of action be dismissed, at the costs of the plaintiffs; to all of which the plaintiffs duly except and exceptions allowed. Whereupon, the plaintiffs give notice in open court of their intention to appeal herefrom to the Supreme Court of this State, and request that the Clerk be instructed to make notation thereof upon his docket, which is accordingly done; and the plaintiffs having requested an extension of time in which to prepare and serve case made, it is further ordered, for good cause shown, that the plaintiffs be granted an extension of sixty days from this date in which to prepare and serve case-made, and the defendant is given ten days after service of the same to suggest amendments thereto, the same to be signed and settled upon three days notice by either party.

Sam Hooker, District Judge.

O. K.: Stephen A. George
V. P. Crowe, Ass't Att'y Gen'l.

Endorsements:

—No. 52682—(Omitting the caption)—Order.—Filed in District Court Oklahoma County, Okla. Oct 27 1927. Cliff Myers, Court Clerk, By Nettie Blumenthal, Deputy.—Recorded: Book 105, Page 46.

In the Supreme Court of the State of Oklahoma.

T. L. Carpenter and Lillie V. Carpenter,
Plaintiffs in Error,

vs.

A. S. J. Shaw, State Auditor of the
State of Oklahoma,
Defendant in Error.

No. 19,122.

SYLLABUS.

1. By Section 9971, C. O. S. 1921, the right to maintain an action for the recovery of an illegal tax is condi-

tioned on compliance with all requirements therein contained, one of which is that the amount of taxes assessed shall be paid at the time and in the manner provided by law. Where a petition on its face shows that there has been no compliance with one of the essential requisites, it fails to state a cause of action.

2. Oil when discovered and reduced to possession by being detached from the soil in which it is embeded becomes and is personal property and is subject to State Gross Production Tax.

3. By the provisions of the Act of Congress of June 28, 1898, 30 Stats. 495, known as the Atoka Agreement, the allotments of Choctaw and Chickasaw Indians were made to be exempt from taxes so long as title remained in the original allottees not exceeding twenty-one years from the date of patent, but said exemption from taxation did not extend to personal property.

4. By Act of Congress, May 27, 1908, 35 Stats. 312, Restriction from alienation was removed from all lands of allottees of the Five civilized tribes enrolled as intermarried whites, freedmen and mixed blood Indians having less than one-half Indian blood, including minors, and in consequence thereof appellants were at liberty to execute oil and gas leases to their lands without interference or regulation on the part of a federal government agency. *Held* oil produced under a royalty interest is subject to the gross Production Tax of the State of Oklahoma, notwithstanding that the land upon which the oil was produced is exempt from taxation.

5. Oil discovered and reduced to possession is personal property and is not exempt from State taxation by the Constitution of the State of Oklahoma.

6. The property upon which the tax in question was levied is not exempt from State taxation by the Constitution of the United States, or by an Act of Congress, or Treaty with the Indians.

7. The gross production tax of the State of Oklahoma as levied under the facts in the instant case, is not a tax upon a federal instrumentality.

Error from the District Court of Oklahoma County, State of Oklahoma.

Honorable Sam Hooker, Judge.

Action by T. L. Carpenter, et al, for the recovery of gross production taxes paid the State Auditor. A demurrer to the petition of plaintiffs sustained, from which appeal is perfected. Affirmed.

Stephen A. George,
For Plaintiffs in Error.

Edwin Dabney, Attorney General,

V. P. Crowe, Assistant Attorney General,

For Defendant in Error.

RILEY, J.

This is an appeal by the plaintiffs below from a judgment against them denying recovery of gross production taxes paid the State Auditor under protest and upon oil and gas produced from lands situated in Carter County.

In the first cause of action it was alleged that T. L. Carpenter was enrolled as a Choctaw Indian by inter-marriage, and that Lillie B. Carpenter was enrolled as a Choctaw Indian of one-sixteenth blood, and that they own allotments located in Carter County from which oil and gas was produced during the calendar year 1926, and that for the year ending December 31, 1926, plaintiffs received the sum of $16,333.00, from the sale of royalty oil and gas produced from their allotments, and that during the quarter ending March, 1927, plaintiffs received the sum of $4,000.00, for the amount of royalty oil and gas produced from their lands and that on April 30, 1927, plaintiffs paid to the defendant the sum of $490.00, the same being equivalent to three per cent of the gross amount received from the sale of said

oil and gas during the year ending December 3, 1926, and at the same time they paid the defendant $120.00, as gross production tax on oil produced for the quarter ending March 31, 1927, and that both sums were paid under portest, and upon production representing the royalty interest to such minerals from the lands described.

In the second cause of action it was alleged that Mattie L. V. Zachary was enrolled as a Choctaw Indian of one-sixty-fourth blood and possessed an allotment in Carter County from which oil was produced under lease executed by her on her allotment to the Gypsy Oil Company and the Sinclair Oil & Gas Company, which lease reserved to her a one-eighth royalty of all oil and gas produced, and that the said Zachary had on the 30th day of April, 1927, paid the State Auditor the sum of $72.18, being three per cent of the gross amount of royalty oil and gas received by her during the quarter ending December 31, 1926, and on the same date paid the State Auditor the sum of $111.06, an equivalent of three per cent of the royalty received during the quarter ending March 31, 1927, and that said payments were made under protest as required by law, and that her cause of action for recovery of said taxes has been assigned to plaintiffs below, and suit has been commenced to recover the same within thirty days.

In the third cause of action it was alleged that Julia A. Morris was enrolled as a one-thirty-second blood Choctaw Indian and has received an allotment in Carter County upon which she has executed a lease to the Magnolia Petroleum Company, and reserved to herself a one-eighth interest as royalty, and that for the calendar year ending December 31, 1926, and the quarter ending March 3, 1927, she had paid to the State Auditor, under protest on April 30th, 1927, three per cent of the moneys received as royalties and that the said Julia A. Morris had assigned to the defendant below her cause of action for the recovery of said gross production taxes so paid.

In each of the causes of action it was alleged that the allottee had not parted with title to the said allotments and

that twenty-one years from date of patent had not expired and that by virtue thereof, said minerals so produced were not subject to the gross production tax Act of the State of Oklahoma. It also appears from the allegations of each cause of action that none of the gross production tax due for the calendar year 1926, was paid at the time and in the manner as provided by law, but that they were all paid when the first quarter annual period tax for the year 1927, was paid, which was on April 30, 1927. The taxes due on said mineral for the quarter ending March 31, 1927, were paid at the time and in the manner provided by law.

A Demurrer to the petition of plaintiff was sustained by the District Court and plaintiffs below elected to stand upon their petition. The trial court rendered judgment dismissing the cause, from which the plaintiffs in error appeal.

We first consider the procedure adopted by plaintiffs relative to the time of payment of the gross production tax claimed for the year ending December 31st, 1926.

Section 9814, C. O. S. 1921, provides and levies gross production tax of three per cent upon minerals produced within this State, and specifies the time and manner of payment, and provides the procedure to be followed for the recovery of such taxes paid under protest. That section reads in part as follows:

> "Every person, firm, association or corporation engaged in the mining or production within this state of asphalt or of ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other crude oil or other mineral oil or of natural gas, shall within thirty days after the expiration of the quarter annual period ending on the last day of March, A. D., 1916, and of each quarter annual period thereafter expiring respectively, on the last day of June, September, December and March of each year, file with the State Auditor, a statement under oath, on forms prescribed by him showing the location of each mine or oil or gas well operated by such person, firm, corporation or association during

the last preceding quarter annual period; the kind of such mineral oil or gas produced; the gross amount thereof produced and the actual cash value thereof at the place of production; the amount of the royalty payable thereon, if any, to whom payable and whether it is claimed that such royalty is exempt from taxation by law, and the facts on which such claim of exemption, if any, is based; and such other information pertaining thereto as the State Auditor may require, and shall at the same time pay to the State Auditor a tax equal to one-half of one per centum of the gross value of asphalt and of ores bearing lead, zinc, jack, gold, silver and copper produced, less the royalty interest, and equal to three per centum of the gross value of the production of petroleum or other crude or mineral oil and of natural gas, less the royalty interest. The owner of any royalty interest shall pay to the State Auditor the tax herein imposed upon such royalty interest within the time and in the manner provided by this Act.

"The tax hereby declared shall also attach to and is levied on what is known as the royalty interest except such royalty interest of the State of Oklahoma or such royalty interests as are exempt from taxation under the laws of the United States and the amount of the tax on the royalty interest shall be a lien on such interest * * * * * * *.

"The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, counties, cities, towns, township, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper, or for petroleum or other crude oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas, or any mine producing

asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described; but any interest in the land other than that herein enumerated, and hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time."

From a reading of the quoted portion of the Act it will be noted that the amount of oil produced is required to be reported to the State Auditor within thirty days after each quarter annual period, which periods expire on the last day of June, September, December and March of each year. Payment of gross production taxes is required to be made upon those dates, consequently gross production taxes due for the first quarter of the year, 1926, were required to be made not later than April 30th, 1926, and payment for the second quarter was required not later than July 30th, 1926, and payment for the third quarter not later than October 30th, 1926, and for the fourth quarter not later than January 30th, 1927. None of the taxes due and payable for the calendar year, 1926, were paid on the dates required, but payment therefor was made on the later date of April 30th, 1927, consequently it appears that only the taxes due for the quarter ending March 31st, 1927, were paid at the time and in the manner provided by law.

Plaintiffs' cause of action for the recovery of these taxes is based upon Section 9971, C. O. S. 1921, which provides:

"In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the

manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days and if within such time summons shall be served upon such officer in a suit for recovery of such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein; if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

The applicable section quoted requires as a prerequisite to the recovery of taxes that the same shall be paid at the time and in the manner provided by law.

In St. L. & S. F. Ry. Co. v. Hendrickson, County, Treasurer, 127 Okla. 243, construing the above section, this court said:

"By section 9971, C. O. S. 1921, the right to maintain an action for the recovery of an illegal tax is conditioned on compliance with all the requirements therein contained. And in such case, where a petition on its face shows that one of the essential requisites has not been complied with, it fails to state a cause of action, and is fatal on demurrer."

See also: St. L. & S. F. Ry Co. v. Hendrickson, 128 Okla. 266; Okla. News Co. v. Ryan, 224 P. 969; Natl. Bk. of Muskogee v. Pitts, 249 P. 907; State ex rel Mothersead v. Bennett, 114 Okla. 76, 243 P. 726.

We, therefore, hold that unless taxes are paid at the time and in the manner provided by law, they cannot be recovered under the procedure provided by Section 9971, supra. It follows that plaintiffs were not entitled to maintain their action in so far as was concerned recovery of taxes due for the year ending December 31, 1926, for the reason that said taxes were not paid until April 30th, 1927, and, therefore, not at the time and in the manner provided by law.

Appellants seek to avoid the rule above announced by applying the decision of the Supreme Court of the United States in Ward v. Board of County Commissioners, Love County, 253 U. S. 17, 64 L. Ed. 751. It appears that case concerned the action of the plaintiff and sixty-six other Indians to recover taxes which they had paid in Love County, Oklahoma, on lands which had been held exempt from taxation by the decision of Choate vs. Trapp, 224 U. S. 665, and it appears that plaintiffs had failed to give notice of protest at the time of payment of such taxes. That decision considered whether or not the taxes were paid at the time and in the manner provided by law. The Supreme Court of the United States held that inasmuch as the Indians had had numerous law suits pending in numerous places resisting the collection of taxes that it could not be said that the taxes were voluntarily paid, and the second syllabus of the reported case, is as follows:

> "Indian allottees who, through pending suits and otherwise, were objecting and protesting that the collection of certain sums from them by a county as taxes on their allotments was forbidden by a law of Congress, cannot be said to have paid such taxes voluntarily, so as to defeat their right to compel restitution, when, notwithstanding such protest, the county demanded payment of the taxes, and by threatening to sell the lands and by actually selling other lands similarly situated, made it appear to such allottees that they must choose between paying the taxes and losing their land, with the result that, to prevent a sale and to avoid the

imposition of a penalty of 18 per cent, they yielded to the county's demand and paid the taxes, protesting and objecting at the time that the same were illegal."

There it was decided that where the State's statute provided that taxes voluntarily paid could not be recovered, such provision did not bar recovery in that cause because the facts showed that payment was not voluntarily made. As we view it that decision is not decisive of the issue here.

Plaintiffs also rely upon the case of Walker et al vs. Hays, 44 O. A. C. R. 93, 127 Okla. 123. There the taxes levied were upon a dwelling house which a full-blood Choctaw Indian had built upon an allotment, which allotment was exempt from taxation. This court held that the houses were a part of the realty; that the realty was exempt and that equitable relief was available to prevent a tax sale of the realty for the reason that the whole assessment was void ab initio. That decision is not decisive as to the manner of payment unless it can be said that the levy is wholly void which contingency is dependent upon whether or not the property taxed personal property or real estate, which is hereafter considered.

The decision of McCoy v. Childers, 124 Okla. 256, 256 P. 25, is decisive of the issue as to the manner of payment and concerns an action to enjoin the collection of gross production taxes upon a royalty interest of an Indian situated exactly as are plaintiffs in error. An appeal from the decision in that case was prosecuted to the Supreme Court of the United States and by the opinion there rendered, the judgment of this court in effect was affirmed in McCoy v. Shaw, 72 L. Ed. 584. Therefore, we hold as to the recovery of the taxes paid for the calendar year 1926, plaintiffs below failed to state a cause of action, because such taxes were not paid at the time and in the manner provided by law, and as to the cause of action for the recovery of such taxes, the demurrer was properly sustained.

Appellant contends that royalties of these plaintiffs are not subject to the payment of the gross production tax of the State of Oklahoma for the reason that the tax exemp-

tion period under which their lands were allotted to them has not expired, and a tax on such royalties is in fact a tax on said exempt lands, whether (a) said mineral royalties are attempted to be taxed as such, or (b) whether they be considered as ordinary rents and produce of said land.

For our determination whether appellant's property is exempt from taxation under any Act of Congress, it is necessary to consider briefly the Acts of Congress relating to the land of plaintiffs below.

By the Act of Congress, June 28, 1898, 30 Stats. 495, commonly known as the Atoka Agreement, and relating to the Choctaw and Chickasaw Nations, a separate allotment for each of said Indians was provided. Such allotments were made to be exempt from taxes for a specified period. The provision is:

> "All allotted land shall be non-taxable so long as title remains in the original allottee, not exceeding, however, twenty-one years from the date of patent."

It is the contention of the appellants that oil produced from their lands is exempt from taxes by reason of the above provision.

Subsequent to the enactment of the Atoka Agreement, Congress passed the Act of May 27, 1908, 35 Stats. 312, which provided in part as follows:

> "From and after sixty days from the date of this Act the status of the lands allotted hereafter or hereinafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or encumbrances, shall be as follows: 'All lands including homesteads of said allottees enrolled as intermarried whites, as freedmen, and as mixed blood Indians having less than one-half Indian blood, including minors shall be free from all restrictions.' * * * * That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes."

The quoted provision of the Act of Congress of May 27, 1908, applies to the appellants in this case, who are less than one-half Indian blood, in so far as the Act of Congress remains intact. In other words restrictions against alienations as to these plaintiffs was by said Act removed and by reason of that Act appellants were free to sell their land, or to lease the same, or to dispose of it in any manner they saw fit without the aid of governmental supervision. It will be noted also that Congress attempted, by the Act, to make the lands upon which restrictions against alienation were removed, taxable, but the validity of that portion of the Act which sought to make the lands of less than one-half blood Indians subject to taxation was presented to the Supreme Court of Oklahoma in Choate v. Trapp, supra, and finally was passed upon by the Supreme Court of the United States in Choate v. Trapp, supra, and the Supreme Court of the United States held by the third paragraph of the syllabus:

> "Choctaw and Chickasaw allottees, under the Atoka Agreement embodied in the Act of June 28, 1898, under which, in part consideration of the relinquishment of all claims to the tribal property, they were to receive allotments of the lands in severalty which were to be non-taxable for a specified period, while the title remained in the original allottees, acquired vested rights of exemption from state taxation, protected by U. S. Constitution, 5th Amendment, from abrogation during that period, as was attempted by the Act of May 27, 1908 (35 Stat. at L. 312, Chap. 199), removing the restrictions upon alienation, and providing that lands from which such restrictions had been removed should be subject to taxation."

And in the body of the opinion:

> "The provision 'that all lands shall be non-taxable' naturally indicates that the exemption is attached to the land, * * * * only an artificial rule can make it a personal privilege."

The case of Choate v. Trapp, supra, announces the principle that Congress was without authority to abrogate the

vested right of an Indian to non-taxable land for a definite period, however, that decision deals solely with the right of the State to tax the Indian's land and does not consider personal property belonging to such Indians, nor oil produced from such land.

Cooley on Taxation, p. 146, lays down the rule that: "the intention to exempt must in any case be expressed in clear and unambiguous terms."

In Llewellyn v. Colonial Trust Co., 72 L. Ed. 19, it was held:

> " Tax exemptions are never lightly to be inferred."

In Goudy v. Meith, 203 U. S. 46, 51 L. Ed. 130, it was there considered whether the lands owned by an Indian were exempt from taxation. It was said:

> "His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens, and the rule of exemptions for him must be the same as for other citizens—that is that no exemption exists by implication, but must be clearly manifested."

Therefore, it is our view that Congress, by its Act known as the Atoka Agreement, exempted from taxation only the land of these appellants, and by reason of the principle that exemptions from taxation by implication are not favored, and since Congress has evidenced its desire to tax the lands of these appellants, that such tax exemption should not extend to the oil produced from said land. This for the reason that the oil as taxed is severed from the land and has become personal property and not subject to the exemption which extends to the land.

In the case of Forbes v. Gracey, 94 U. S. 762, an action was brought to force the collection of the Nevada gross production tax. The tax by the State of Nevada was imposed upon the proceeds of a mine worked by a corporation. Payment of the tax was resisted on the ground that title to the land from which the mineral was taken was in the United States, and for that reason not subject to State taxation.

In the cited case it was held that the State had power to impose the tax in question upon the minerals taken from the land; that the moment the ore became detached from the soil in which it was embedded it became personal property subject to taxation, although the land from which it was taken was not taxable. The decision contains the following language:

> "It is very true that Congress has, by statutes and by tacit consent, permitted individuals and corporations to dig out and convert to their own use the ores containing the precious metals which are found in the lands belonging to the government, without exacting or receiving any compensation for these ores, and without requiring the minor to buy or pay for the land. It has gone further, and recognized the possessory rights of these minors, as ascertained among themselves by the rules which have become the laws of the mining districts as regards mining claims. See Revised Statutes, Title XXXII, Chap. 6, Section 2318-2352. But in doing this it has not parted with the title to the land, except in cases where the land has been sold in accordance with the provisions of the law on that subject. If the tax of the State of Nevada is, in point of fact, levied on this property right of the United States, we are bound by our previous decisions and by sound principle to hold that it is void. If, on the other hand, it is levied on property of the minor, and may be collected without affecting or embarrassing the title of the United States to property which belongs to that government, then there is no ground for interference with the processes of the State in its collection. A few extracts from the statute of Nevada showing the nature and character of the property on which the contested tax is imposed, and the manner of its enforcement and collection, will enable us to decide whether it belongs to the one or the other of these classes. We copy here the important sections of the Act of Feb. 28, 1871, imposing this tax: (Here the court quotes the statutes) * * * * .

"As we construe the statutes of the United States and the recognized rule of the government on this subject, the moment this ore becomes detached from the soil in which it is embeded it becomes personal property, the ownership of which is in the man whose labor, capital and skill has discovered and developed the mine and extracted the ore or other mineral product. It is then free from any lien, claim, or title of the United States, and is rightfully subject to taxation by the State as any other personal property is.

"The trust of this proposition is too obvious to need or admit of illustration or elaboration, and, as we have already said, the pressure of business does not admit of it.

"In regard to the taxing of this personal property, and the mode of collecting it by sale as provided in the section last cited, it does not seem to us that there can be any ground for asserting that the United States has any interest in the tax or in the sale of the property taxed."

The lands involved in the cited case were as free from State taxation as the lands involved in the case at bar, yet in the cited case, notwithstanding the fact that the lands were non-taxable, the court held, and we follow the rule, that when the minerals were produced, they became personal property and as such were subject to taxation.

Plaintiffs contend that the foregoing case is not analagous to the instant case in that in the case cited the Government did not own the minerals, where in this case the appellants enjoy the royalty interest in the minerals sought to be taxed.

We hold such contention is a distinction without a difference.

A controlling principle of the cited case is that though the lands from which minerals are produced are exempt from taxation, minerals when produced and severed from the soil become personal property and as such the exemp-

tion from taxation as to the land cannot be extended to such personal property. Moreover, Choate v. Trapp, supra, sets out that plaintiffs in error tax exemption attaches to the land itself and is not a personal privilege. It is therefore appears to us immaterial that appellants owned the oil here sought to be taxed.

Morever, the royalty interest of appellants under the leases in fact is merely a payment to them as owner of the land upon which the production exists, varying according to the amount actually gotten, reduced to possession, secured, severed from the soil, etc.

In the case of Elders v. Wood, 208 U. S. 226, the gross production tax Act of the State of Colorado was upheld. In that case it was contended that the tax levied upon products from mines situated upon land granted by the United States was invalid for the reason that the operation of such mines was a federal agency which was exempt from a State tax, but the opinion held that the products obtained from the mines were property belonging to the operators, and the court said:

> "Such an interest from early times has been held to be property distinct from the land itself, vendable, inheritable and taxable."

See also: Belk v. Meager, 104 U. S. 283;
Manuel v. Wulff, 152 U. S. 505;

St. Louis Mining & Milling Co. v. Montana Mining Co., 171 U. S. 650.

In Kelly v. Ohio Oil Co., 39 L. R. A. 765, the Supreme Court of Ohio held:

> "Petroleum oil is a mineral, and while in the earth it is part of the realty, and, should it move from place to place by percolation or otherwise, it forms part of that tract of land in which it tarries for the time being, and, if it moves to the next adjoining tract, IT BECOMES part and parcel of that tract; and it forms part of some tract until it reaches a well, and is raised

to the surface, and then for the first time it becomes personal property—the property of the person into whose well it came. And this is so whether the oil moves, percolates, or exists in pools or deposits. In either event, it is the property of, and belongs to, the person who reaches it by means of a well, and severs it from the realty, and converts it into personalty. * * * "

See also: Nonamaker v. Amos, 76 L. E. 949, 4 L. R. A. (N. S.) 980; Kelley v. Keys, 62 Atl. 911, (Pa.).

In Barnes v. Keys, 36 Okla. 6, 127 P. 261, it was held: "Oil in place is a mineral and being a mineral is part of the realty." While the last cited case did not distinguish between the nature of the property after it had been reduced to possession and produced, it would be reasonable that the counterpart would be true, that is, that after the mineral is severed from the ground and reduced to possession it would become personal property. Such conclusion is borne out by the authorities heretofore cited. Since only the land of plaintiffs in error is exempt from taxation, such exemption should not be extended to personal property, and the trend of recent decisions seems to support this view. Shaw v. Gibson-Zopniser, 72 L. Ed. 369.

We now note cases relied upon by plaintiffs in error. As heretofore set out, Barnes v. Key, supra, is not decisive of the issue here. That case does not hold that oil when severed from the soil is anything other than personal property.

Appellants cite State ex rel v. Snyder, 212 P. 758, (Wyo.) and the fourth paragraph of the syllabus thereof, which is as follows:

"Under Act of Admission, Section 4, granting school lands to the State, but by Section 13, excluding mineral lands, and Section 5, requiring disposition by public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended for maintenance but permitting five years leases, and under Const. Art. 7, Sec. 2, declaring proceeds from such sales or leases to be a perpetual fund,

and Const, Art. 7, Sec. 7, restricting application of rents from unsold lands to the support of free schools, Held, that rents and royalties derived from oil leases are not the ordinary rents contemplated by Const., Art. 7, Sec. 7, but arise from and represent the corpus of the land, and must be treated as principal becoming part of the permanent school fund, and Laws 1921, c. 66, and Laws 1921 c. 147, amending Comp. St. 1920, Sec. 144, are unconstitutional in so far as authorizing diversion of oil rents and royalties from the permanent fund."

It will be noted that the Wyoming Court held under the constitutional provision cited that the proceeds from the sale of school land should constituted a permanent school fund, consequently that rents and royalties should go to the permanent school fund because they were proceeds from school lands.

That decision would be applicable had Congress exempted the lands of the Indians here concerned as well as the proceeds from their lands, but the Act of Congress under consideration exempts only the land alone from taxation, and such exemption cannot be extended by our decision.

Appellant cites State ex rel v. Hatcher, 281 S. W. 92, wherein the Supreme Court of Texas dealt with the question that was before the Supreme Court of Wyoming in the Snyder case, supra, and the Texas Court held:

"Oil is part of 'land' and can be sold in place."

The constitutional provision is substantially the same as that of Wyoming in that it required the proceeds from the sale of school lands to go to the permanent school fund. The Texas Court held that the rents and royalties were the proceeds from school lands and should go to the permanent school fund and that the Act of the Legislature which permitted the use of said money for the construction of buildings for the University of Texas was unconstitutional. The Texas Court said:

"If it should be contended that oil, when severed from the land, becomes personalty, that fact is immaterial and would not change the status of such property. It is provided in our Constitution that the 'proceeds' of the land which is gone shall become part of the permanent fund. In other words, not only the realty, but the resulting personalty is a part of that fund. Of course, proceeds arising from an alienation or taking of land, or any portion thereof, should always be in the permanent fund. It was foreseen that it might be best to sell it. In that event it was expressly provided that the substitute for the land should take its place in the permanent fund."

From the quotation above set out, it appears that it was the view of the Texas Court that oil when severed from the land became personalty, but such fact was immaterial because of the particular constitutional provision applicable to the proceeds from such land.

Appellants cite the case of Pollock v. Farmers Loan & Trust Co., 157 U. S. 429, in which was considered the validity of an Act of Congress levying an income tax without regard to the rule of apportionment as required by the Constitution of the United States. The first question there considered was whether a tax on the rental or income of real estate was a direct tax within the meaning of the Constitution, and it was held that the same constituted a direct tax requiring apportionment among the State, the same as a tax upon the land itself, and it was held that an income tax upon rents from lands, not apportioned as required by the Constitution among the States, was invalid because it was a direct tax. That such is proper construction of the holding in the Pollock case is evidenced by the holding in Evans v. Gore, 253 U. S. 244, where the question involved was as to whether or not the federal government could levy an income tax on the salary of a federal judge, and where it was held that the Constitution of the United States prevented the deminution of the emoluments of a federal judge during his term of office. That opinion recites:

"Let us turn, then, to the circumstances in which

this amendment was proposed and ratified, and to the controversy it was intended to settle. By the Constitution all direct taxes were required to be apportioned among the several states according to their population, as ascertained by a census or enumeration (Art. 1, Sec. 2, CL. 3, and Sec. 9, CL. 4), but no such requirement was imposed as to other taxes. And apart from capitation taxes, with which we now are not concerned, no rule was given for determining what taxes were direct and therefore to be apportioned, or what were indirect and not within the requirement. Controversy ensued and ultimately centered around the right classification of income from taxable real estate and from investments in taxable personal property. The matter then came before this court in Pollock vs. Farmers' Loan & T. Co., 157 U. S. 429, 39 L. Ed. 759, 15 Sup. Ct. Rep. 673; 158 U. S. 601, 39 L. Ed. 1108, 15 Sup. Ct. Rep. 912; and the decision, when announced, disclosed that the same differences in opinion existing elsewhere were shared by the members of the Court—five, the controlling number regarded a tax on such income as in effect a direct tax on the property from which it arose, and therefore as requiring apportionment. Much of the law then under consideration had been framed according to the latter view, and because of this and the adjudged inseparability of other portions the entire law was held invalid. Afterwards, to enable Congress to reach all taxable income more conveniently and effectively than would be possible as to much of it if an apportionment among the States were essential, the Sixteenth Amendment was proposed and ratified. In other words, the purpose of the Amendment was to eliminate all occasion for such an apportionment because of the source from which the income came,—a change in no wise affecting the power to tax, but only the mode of exercising it."

Consequently as we view it these decisions relied upon by the appellant are not decisive of the issue in his favor.

It is next contended by the appellant that the enforcement of this tax is in violation of Section 8, Art. 10, of the Constitution of Oklahoma, as well as the Fifth and Fourteenth Amendments to the Constitution of the United States.

The appellants point out that Section 8, Art. 10, of the Constitution of Oklahoma requires all property to be assessed at its fair cash value, and that Section 5, Art. 10, supra, requires that taxes be uniform upon the same classes of subjects, and that Section 5, of Art. 5, of the Constitution of Oklahoma specifies that all property except as is expressly therein exempt shall be subject to taxation.

All of these questions presented have been adversely determined by this Court.

As to whether or not such gross production tax Act constituted an exemption from taxation of that property in lieu of which the gross production tax was levied was decided in In re Gross Production Tax of Wolverine Co., 154 P. 362, in which this Court said:

> "As to those liable to and who pay a gross production tax, it will be noted that the Act does not in terms exempt equipment and machinery, but provides that the payment of the gross production tax shall be in lieu of any other tax that might be levied and collected on said property upon ad valorem bases. This is not an exemption from taxation within the meaning of the constitutional inhibitions, but a substitution of one form of taxation for another upon the terms and conditions named. The equipment and machinery referred to is confined to that used in the actual operation of producing wells, hence, does not include equipment and machinery on hand, and not so used. By the act a tax is levied based upon the value of the gross production. This can only arise through the discovery and production of oil or gas. The equipment and machinery owned by the producer, and which is an indispensable agency in the discovery and production of the commodity, forms a part of the property out of which

> the production arises. Without it production is impossible. The same is not taxed directly, neither are the lands or leases, where the production is through a lessee."

Likewise, in In re: Skelton Lead & Zin Co.'s Gross production tax, 81 Okla. 134, 197 P. 495, this Court said:

> "The same section provides also that 'the payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, county, cities, towns, townships, and school districts and other municipalities . . upon the machinery, appliances, and equipments used in and around any well . . . and also upon the oil, gas, asphalt, or ores, . . during the year in which same is produced.'
>
> "Thus it appears that the sole object of the Legislature was to adopt a practicable means for ascertaining the fair cash value of these smelting plants and equipment 'as going concerns,' and to levy a 'property tax' thereon according to such value, and deeming the gross value of the products therefrom a fair and practical measure for ascertaining such value, it adopted such measure and levied a tax which it specifically provided should be in full and in lieu of all other taxes, and which should be no greater nor less than the general ad valorem rate of 'property tax', upon other property within the state, assessed at its fair cash value."

Thus it appears that the gross production tax is a property tax assessed upon producers of minerals as going concerns and based upon three per cent of the gross proceeds after and when the subject of the tax is produced. Likewise, everything incident to the lessee's production is taxed on a basis of three per cent of the oil and gas produced and everything incident to the lessor's royalty rights in the production is assessed upon a three percent basis of his share of the oil and gas so reduced to possession.

We find no discrimination between the lessor and the lessee for each is assessed in the same manner and there is

no denial to the one or the other of equal protestion of the law and no violation of the Fourteenth Amendment to the Constitution of the United States.

The Wolverine case, *supra*, dealt with the contention that the gross production tax was in violation of the Fourteenth Amendment to the Constitution of the United States, and came to a conclusion adverse to appellants by concluding that no right vouchsafed by the Federal Constitution had been denied or in anywise impaired by the provisions of the statute under consideration. See also: Protest of Bendelari, 82 Okla. 97, 198 Pac. 606.

We, therefore, conclude that this Court has heretofore determined that the Act under consideration is not in violation of the uniformity clause or the tax exemption clause of the Constitution of Oklahoma, as well as not being in violation of the Fourteenth Amendment to the Constitution of the United States.

Appellants rely upon: Thomas v. Gay, 42 L. Ed. 740; Gillespie v. State of Oklahoma, 66 L. Ed. 338; Jaybird v. Weir, 271 U. S. 609, 70 L. Ed. 1112; Indian Territory Illuminating Oil Co., v. Oklahoma, 240 U. S. 522, 60 L. Ed. 779; Choctaw O & G. R. Co., v. Harrison, 235 U. S. 292, 59 L. Ed. 234.

In each of these cited cases the minerals produced and sought to be taxed were produced from restricted Indian lands under departmental leases, whereas in the instant case the plaintiffs in error were at all times free to lease their land without governmental supervision by reason of the Act of Congress, May 27, 1908.

In Choctaw O. & G. R. Co., v. Harrison, *supra*, the gross production tax levied was upon mines of the Choctaws and Chickasaws, and upon segregated and unallotted lands, and wherein it was provided that the royalty was to be paid into the United States Treasury for educational purposes. The mines were under the supervision of trustees appointed by the president and subject to rules prescribed by the Secretary of the Interior. The lease there considered required

the approval of the Secretary of the Interior and so it was there held that the tax sought to be collected was one upon a federal instrumentality.

In the Gillespie case, *supra*, it was sought to collect a tax on a net income derived from leases of restricted Creek and Osage Indians lands, and the leases there considered were departmental leases.

In the Jaybird case, *supra*, it was sought to impose an ad valorem tax upon ore in the bin, though the ore having been produced from the patented allotment of a Quapaw Indian, which allotment was restricted from alienation until 1946. The lease there considered under which the ore was produced was executed under the Act of Congress of June 7, 1897, providing for direction and approval by the Secretary of the Interior, and a departmental lease was involved. And so with all of the cases cited.

The cases are not applicable to matter at bar for here no federal instrumentality is involved. Apparently no agency of the federal government is exercising supervision over the property in question, and, therefore, we conclude that the tax in question is not a tax upon a federal instrumentality. It is not even contended here that any federal instrumentality is involved, and there is an entire absence of any governmental supervision of appellants' land. Consequently, we affirm the judgment of the lower court in sustaining the demurrer of the defendant in error to the petition of the plaintiffs below.

Branson, C. J., Mason, V. C. J., Lester, Hunt, Clark, Hefner, J. J.—Concur.

Service of the within petition for rehearing and acknowledgment of a receipt of a copy thereof is hereby accepted this 27th day of Sept, 1928.

V. P. Crowe.
Asst. Atty. Genl.

In the Supreme Court of the State of Oklahoma.

Filed in Supreme Court of Oklahoma, Sept. 27, 1928
Jessie E. Moore. Clerk.

T. L. Carpenter and Lillie V. Carpenter,
Plaintiffs in Error,

vs.

A. S. J. Shaw, State Auditor of the State of Oklahoma,
Defendant in Error.

No. 19,122

PETITION FOR REHEARING.

Now come T. L. Carpenter and Lillie V. Carpenter, plaintiffs in Error, and respectfully represent and show to this honorable Court that on the 18th day of September, 1928, a judgment and decision was rendered by this Court in the above styled and numbered cause, affirming the judgment rendered in said cause by the District Court of Oklahoma County, Oklahoma, in said action, which sustained the demurrer of the defendant in error to the amended petition filed in said cause by plaintiffs in error; but plaintiffs in error respectfully represent and show to this honorable Court that there was error in said judgment and decision of this Court in the following particulars, to-wit:

(1) Said judgment and decision overlooked a question decisive of the case and duly submitted by counsel, namely, that Section 9814, C. O. S. 1921, commonly known as the Gross Production Tax Statute, as construed by this Court does not levy a tax upon the minerals after severance, as personal property, but upon other valuable property rights, which includes, when applied to the royalty owner, his mineral rights attached to and inherent in the land; or in other words, his interest in the minerals stored in the land.

(2) That said decision overlooked a further decisive question in the case duly submitted by counsel, that the sale of royalties accruing to plaintiffs in error under the con-

ditions alleged in their amended petition filed in this case is but a conversion of an interest in the fee into cash, and that the tax complained of is in fact a tax on the proceeds of the sale of an interest in the fee from which said mineral royalties are produced.

(3) That said decision is in conflict with a controlling decision of this Court, duly submitted by counsel, but which appears to have been overlooked by the Court in its opinion in this case, to-wit, the holding of this Court in the case of In Re Skelton Lead & Zinc Company's Gross Production Tax for 1919, 81 Okl. 134, 197 Pac. 495, where it is said:

> "In deciding this question, we bear in mind that *the tax in question is not levied upon the mine products themselves, but as we interpret the statute, is levied upon the entire property, mills, plants, machinery, equipment, etc., 'as a going concern,' the value of which as a going concern and the reasonableness of the rate upon which is to be ascertained by the gross value of the products.*"

(4) Said decision is in conflict with a controlling decision of the Supreme Court of the United States, to-wit, the case of Choate vs. Trapp, 224 U. S. 665, 56 L. Ed. 941, which holds that a liberal rule of construction should be applied to the class of persons to which plaintiffs in error belong, with regard to the exemption of their allotments from taxation, rather than a strict rule of construction as applied by the Court in its decision in this case.

(5) Said decision is in conflict with a further controlling decision of the Supreme Court of the United States, namely, the case of Pollock vs. Farmers' Loan & Trust Company, 157, U. S. 429, 39 L. Ed. 759, where it is held that a tax on the income is a tax upon the land from which the income is produced.

(6) That the provisions of Section 9814 C. O. S. 1921, which are construed and sustained by said decision as to the right to tax plaintiffs in error's allotments and the mineral royalties accruing therefrom, in the manner alleged in

the amended petition filed in this case, are, as thus construed, rendered violative of and in conflict with the provisions of the Atoka Agreement of April 23rd, 1897, adopted June 28th, 1898, and ratified August 24th, 1898, (30 Statute at Large 495, Chap. 517) under which plaintiff in errors' lands were allotted and patented to them in severalty; and violative of the provisions of Sections 5 and 8 of Article 10 and of Section 5 of Article 5 of the Constitution of Oklahoma, and of the 5th and 14th Amendments to the Constitution of the United States.

(7) Said decision in so far as it holds that it was necessary to have paid the taxes demanded on royalties received during the year 1926, at the time and in the manner as provided by law, before recovery thereof could be had, is in conflict with the prior decision of this Court in the case of Kenoyer vs. Board of Equalization of Ottawa County, 264 Pac. 891, and the decision of the Supreme Court of the United States in the case of Ward vs. Board of County Commissioners of Love County, 253 U. S. 17, 64 L. Ed. 751.

WHEREFORE, plaintiffs in error pray that the aforesaid judgment and decision of this Court made and entered in this cause be vacated, set aside and held for naught, and that a re-hearing be granted in said cause by this honorable Court.

Stephen A. George,
Attorney for Plaintiffs in Error.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION TO REHEAR.

We have previously urged upon this Court our reasons for the invalidity of the tax sought to be enforced as against plaintiffs in error and their assignors, and have cited the cases from this and other courts upon which we rely for a recovery in this action, but we can not refrain from saying a few words in support of our petition to rehear, and to respectfully urge upon this Court that the decision in this case is in conflict with a prior controlling decision of this Court in the case of In Re Skelton Lead & Zinc Company's Gross Production Tax for 1919, 81 Okl. 134, 197 Pac. 495,

where this Court in a well reasoned, able opinion by Mr. Justice Harrison held that: "The tax in question is not levied upon the mined products themselves, but as we interpret the statute, is levied upon the entire property, mills, plants, machinery, equipment, etc., as a going concern, the value of which as a going concern and the reasonableness of the rate upon which is to be ascertained by the gross value of the products."

It is true that the Court was there dealing with the producer, while here we have the royalty owner involved, but we respectfully submit that the same rule should apply as to the royalty owner, and that the tax is levied upon and includes the value of the remaining minerals which are attached to and stored in the land. As previously pointed out, Section 9814, *supra,* divides the business of oil production into two classes, the producer and the royalty owner, and it is expressly provided in the statute that the gross production tax is in full and in lieu of all taxes for all purposes, "upon any property rights attached to or inherent in the right to said minerals * * * upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to the land * * * and also upon the oil, gas * * * during the tax year in which the same is produced * * * but any investment in the land other than that herein enumerated * * * shall be assessed and taxed as other property within the taxing district in which such property is situated at the time." The writer can not understand how anyone can escape the force of the above quoted language, taken from Section 9814, *supra,* and how anyone can arrive at any other conclusion than that said statute levies a tax, not upon the minerals only, after severance from the soil, as personal property, but upon the mineral rights inherent in the land as well. The statute further provides that any other interest in the land shall be subject to an advalorem tax, clearly indicating, to the writer's mind, that the legislature intended that the gross production tax should cover and include the increased value to the land on account of the discovery of oil or gas. Such was the express holding of this Court in the case of Kenoyer vs. Board of Equaliza-

tion of Ottawa County, *supra,* where it is said in the second paragraph of the syllabus, that:

> "Added value for taxation should not be given land because of actual or prospective minerals beneath surface, subject to gross production tax when extracted."

In other words, this Court has heretofore, when construing the statute as applied to others than Indian allottees of the class of plaintiffs in error, that the gross production tax levied by Section 9814, *supra,* covers and includes the added value to land on account of the discovery of oil and gas and that the value for advalorem purposes should not be increased by reason of the production of oil and gas therefrom. If therefore, a part of the tax is levied upon an interest in the land—and we most respectfully submit that the language of the statute itself and the prior decisions of this Court above referred to seem to establish that fact—then the entire tax must fail and the State is without power to enforce any portion of the same, even should we concede—which we do not—that the state could levy a tax upon the minerals immediately upon severance. The following authorities establish that where a portion of a specific levy is illegal, the whole tax must fail, where the legal portion can not be separated from the illegal portion of the tax; People ex rel. Sanders v. Cairo, V. & C. R. Co., 249 Ill. 97, 94 N. E. 11; Stetson vs. Kempton, 13 Mass. 272, 7 Am. Dec. 145; Hewitt v. White, 78 Mich. 117, 43 N. W. 1043; Choat v. Phelps, 63 Kan. 762, 66 Pac. 1002.

We again urge upon the Court and most respectfully submit that to hold that the gross production tax as applied to the class of persons to whom plaintiffs in error belong is levied upon their minerals after severance violates the provisions of Sections 5 and 8 of Article 10, and of Section 5 of Article 5 of the Constitution of the State of Oklahoma, and the 5th and 14th Amendments of the Constitution of the United States, for the reason that said tax when applied to others covers and includes a tax upon other valuable property rights, and which are in fact of far greater value than the minerals themselves, which have been produced.

We therefore, respectfully urge the Court to give earnest consideration to what we have said above in connection with the arguments advanced in the briefs previously filed in this case, and that a rehearing be granted in this cause.

Most respectfully submitted,

Stephen A. George,
Attorney for Plaintiffs in Error.

Supreme Court; December Term, 1928, December 18th, 1928, Second Judicial Day.

United State of America,
State of Oklahoma, ss.

BE IT REMEMBERED, that on this Dec 18 1928, Supreme Court convened pursuant to adjournment of Dec 11 1928.

Present: F. P. Branson, Chief Justice, C. W. Mason, A. C. Hunt, R. A. Hefner, J. W. Clark, F. Riley, J. I. Phelps, and J. B. Harrison, Associate Justices, Jessie E. Moore, Clerk and S. S. Brooks, Marshal.

Public proclamation of the opening of court having been made for the transaction of such business as might properly come before it, the following proceedings were had, to-wit:

19,122 Carpenter et al. vs. Shaw, etc.

And now on this day it is ordered by the court that the petition for rehearing filed in the above cause be, and the same is hereby denied.

Filed in Supreme Court of Oklahoma Feb 9 1929. Jessie E. Moore, Clerk.

In the Supreme Court of the United States.
T. L. Carpenter, and Lillie V. Carpenter,
Petitioners,

vs.

A. S. J. Shaw, State Auditor of the
State of Oklahoma,
Respondent.

No. 19,122

File No.----------

STIPULATION OF PORTIONS OF RECORD TO BE PRINTED.

The parties hereto hereby designate for printing under the supervision of the Clerk the following portions of the record to present the questions involved, a complete transcript of which is being prepared for filing herewith:

(1) Amended petition of plaintiffs.
(2) Demurrer to amended petition.
(3) Order and judgment of District Court of Oklahoma County, sustaining said demurrer.
(4) Opinion of the Supreme Court of the State of Oklahoma.
(5) Petition for rehearing and order denying the same, which was entered on the 18th day of December, 1928.
(6) Refer to bond.
(7) Stipulation of portions of record to be presented.

It is further stipulated and agreed by and between the parties hereto that the foregoing designation of the portions of the record to be printed is adequate and sufficient for presentation of the questions involved herein.

Stephen A. George
Attorneys for Petitioners.

Edwin Dabney
Attorney General of the State of Oklahoma.

By V. P. Crowe
Assistant Attorney General.

Filed in Supreme Court of Oklahoma, Feb 9 1929. Jessie E. Moore, Clerk.

In the Supreme Court of the State of Oklahoma.

T. L. Carpenter and Lillie V. Carpenter,
Plaintiffs in Error,
vs.
A. S. J. Shaw, State Auditor of the
State of Oklahoma,
Defendant in Error.
No. 19,122

BOND ON APPEAL.

Know All Men By These Presents:

That, we, T. L. Carpenter and Lillie V. Carpenter, as principals, and the undersigned sureties are held and firmly bound unto A. S. J. Shaw, as State Auditor of the State of Oklahoma, in the penal sum of $200.00, good and lawful money of the United States, for the payment of which we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators firmly by these presents. *Sealed* with our seals, and dated this the 4 day of February, 1929.

Whereas, the above named principals intend to file a petition for writ of certiorari in the Supreme Court of the United States to review the judgment of the Supreme Court of the State of Oklahoma in the above styled and numbered cause:

Now, therefore, the condition of this obligation is such that if the above named principals shall prosecute their said appeal to effect and answer all costs, if they fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

T. L. Carpenter
Lillie V. Carpenter
Principals
Roy L. Zachary
Mattie L. V. Zachary
Sureties

JUSTIFICATION.

State of Oklahoma,
County of Stephens—ss:

Roy L. Zachary and Mattie L. V. Zachary, of lawful age, being duly sworn, depose and state that they are resident freeholders of Stephens County, Oklahoma, and that they are each worth the sum of $1,000.00 over and above their just debts and exemptions.

Roy L. Zachary
Mattie L. V. Zachary

Subscribed and sworn to before me this the 4th day of February, 1929.

Viola Malone
Notary Public.

(Seal)

My Commission Expires: July 11/31

The Above and foregoing bond is examined and approved by me this the 9th day of February, 1929.

Charles W. Mason
Chief Justice

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 15, 1929

The petition herein for a writ of certiorari to the Supreme Court of the State of Oklahoma is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7398)